
U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE: March 29, 1993
CASE NO: 93-ERA-1

In the Matter of

L. CRAIG WAGERLE, PH.D.,

Complainant

v.

THE HOSPITAL OF THE UNIVERSITY OF PENNSYLVANIA, THE DEPARTMENTS OF PHYSIOLOGY AND PEDIATRICS,
Respondents

Troy E. Grandel, Esq.

For the Complainant

Alan D. Berkowitz, Esq.
Dechert Price & Rhoads
For the Respondents

Before:

JOEL R. WILLIAMS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This matter arises from a complaint filed by Dr. L. Craig Wagerle on August 27, 1992, under Section 210 of the Energy Reorganization Act of 1974, as amended prior to October 24, 1992 (ERA), 42 U.S.C. §5851, and the regulations promulgated thereunder,

29 C.F.R. Part 24. The complaint alleges that the Respondents retaliated against the Complainant, by terminating his appointment and by removing certain of his property from his laboratory, because of his having filed a prior complaint under the ERA and because of his being a key witness for another employee in his ERA complaint. The respondent contends that the complaint was not timely filed. It contends further that, in any event, the Complainant's appointment was terminated because he had failed to obtain grants to fund his research and that the removal of any items from the laboratory was in connection with the preparation of the

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building for demolition.

The aforementioned prior complaint was dismissed with prejudice by the Secretary of Labor on March 9, 1992 pursuant to the Complainant's Motion to Dismiss with Prejudice executed on November 22, 1991. Accordingly, I ruled in telephone conferences with counsel for the parties that the hearing in this case would be confined to those alleged retaliatory acts occurring subsequent to November 22, 1991. On November 20, 1992, I issued an Order in which I granted the Respondent's Motion for Sanctions and restricted the issues in this case to those identified in the Complainant's letter of August 27, 1992 to the United States Department of Labor, Wage and Hour Division.

A hearing in this case was held in Philadelphia, Pennsylvania on November 30 and December 1 and 2, 1992. The parties were given full opportunity to present there evidence and the record was left open for the filing of briefs. This has been accomplished and the record is now closed.

PROPOSED FINDINGS OF FACTS

After receiving a doctorate in physiology from the University of Kansas in 1980, the Complainant entered into a fellowship program in the Department of Physiology of the University of Pennsylvania School of Medicine. Upon completing the program he remained at the University doing research in the area of regulation of cerebral circulation under the auspices of Dr. Delivoria-Papadopoulos. In 1989 he was appointed a Research Assistant Professor in the Departments of Physiology and Pediatrics. The appointment was for a period of five years "or for the duration of the grant or contract which supports his work, whichever is the shorter period of time (full salary, without obligation on the part of the University to continue salary and benefit beyond termination of these research funds ...)" (Respondent's Exhibits (RX) - 5 & 27)

The Complainant testified that during his ten years at the University he authored or participated as co-author 25 or more grant proposals which were submitted primarily to the National Institutes of Health. He described the grant process as follows:

"It's a very complex process but in terms of how NIH awards grants and the granting process. But any one of these grants, to write, may take two months simply for writing process not to mention perhaps a year or more of data collection in order to get the supporting scientific data for that grant.
"So, it's not a matter of sitting down a few days and writing up a proposal. These are very heavy input and that's why I list them here because they really represent a large output of effort.
"So, when one's funded, then you have money to go on and do the work. And you can see that perhaps we have five or six grants funded over the course of

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10 years out of more than 20 submitted and that's not all unreasonable. I mean to have that kind of funding from NIH is quite commendable and I'm very proud of that. But it also gives you a sense of how competitive and what a burden it is to any investigator to be able to submit at this rate and to be awarded the funds." (T-44-45)

When asked whether the fact that a proposal is not funded means that it is rejected, the Complainant responded:

"Actually, no. Out of all 30, I think that there may have been two in there that were rejected and one of those were mine. Rejected means it was not -the term they use is -- I forgot what their term is -but grants aren't usually rejected unless they're not at all even fundable but quite often their rated a priority in terms of their scientific merit and based on that priority, the very best ones get the funds until the funds run out.
"And there's a scale from poor to outstanding and almost all of these grants, in fact, received either a good or a excellent rating but in today's environment and competition at NIH, you need to be in the outstanding level to actually receive the funding. So, they're often recommended or approved -- that's the word I was looking for -- they're approved for funding but without sufficient funds and that's where many of the unfunded ones fell.
"So, it's not the mark of bad science when they're not funded but it's simply a mark that they're not as good as the very best and there's not enough funds to go around." (T-45-46)

The Complainant testified further that the process from submission of the proposal to the receipt of grant money takes about one year. He estimated that only about twelve percent of the grant proposals submitted to NIH are funded. Prior to receiving grants as a principal investigator, the Complainant's salary was funded through Dr. Delivoria's grants and to a smaller measure through clinical funds, i.e., monies developed from patients in the clinical practice. By 1991, he was receiving about 30 percent of his salary from clinical funds in return for training he was providing to Neonatology fellows. He was also receiving 25 percent of his salary from a Dr. Delivoria grant but he ceased performing services on this grant in July 1991 and his salary support from this source ceased as of August 1, 1991.

On November 1, 1991, Dr. Elias Schwartz, Professor and Chairman, Department of Pediatrics, and Dr. Paul De Weer, Professor and Chairman of the Department of Physiology, addressed the following letter to the Complainant:

> "As you know your NIH research grant (budget #5-20295) which expires May 1992 is administered through the Physiology Department whereas your faculty appointment is in the Department of Pediatrics. Your research effort on the quoted grant is currently 70%, the remainder of your salary being supplied from other sources. To our knowledge, you have no other grant support at this time.

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> "This letter is to advise you that with the current allocations in your grant budget the salary portion of your NIH grant provides support through February 1992. You might therefore wish to consider reallocation of some or all of the dollars for consumables (current balance $30,210) and travel (current balance $2,248) to salary support. By doing so this and with continuation of the remainder of your salary budgeted from the neonatal HUP account you will have salary support until June 30, 1992.
> "University rules provide that your employment with the University is contingent upon availability of external funding to support your salary and research. This is also consistent with individual departmental practice."

Dr. David Cornfield, Vice Chairman of the Department of Pediatrics, testified that he authored the aforementioned letter and had met with the Complainant at about the time it was sent to review this information with him. Dr. Cornfield related instances where other Research Associate Professors had left the University because of the inability to obtain outside salary support. The record includes copies of letters to two Research Associate Professors which, in effect, advises them of that their appointments would need to be terminated if they did not obtain additional salary support. (RX-32 & 34)

As of March 1992, the Complainant had received no additional grant funding. He had one proposal pending before NIH which he had submitted in July 1991. The proposal had been assigned a rating of about 230. At that time NIH was only funding proposals with scores of around 170 or less and the Complainant acknowledged that it was unlikely that his proposal would be funded.

Also in March 1992, the Complainant completed an application for a research grant he was attempting to obtain from the United Cerebral Palsy Research and Educational Foundation. The grant was to cover 20% of the Complainant's salary and was to be effective on January 1, 1993. The application was due on March 10, 1993. On or about March 5, 1992, the Complainant delivered the application to Dr. De Weer's office for his approval on behalf of the University. Dr. De Weer attempted to meet with the Complainant to discuss the application. This was not successful and on March 9, 1992, he faxed the following "Draft" letter to the Complainant.

"Confirming our discussion of today, I will countersign the grant proposal you are submitting to the Cerebral Palsy Foundation, as a courtesy to you and for the full purpose of helping you obtain research support as well as 20% of your salary, in the event you are able to find suitable employment to cover the remainder of your salary.

"As you know, and as confirmed in the November 1, 1991 letter of Dr. Schwartz and myself to you, University regulations provide that your employment with the University is contingent upon availability of external funding to support your salary and research. To the best of my knowledge, your external funding will cease on or about May 31, 1992.

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'It is my belief that the School's Administration will not support your research proposal without a clear and agreed upon understanding as spelled out above. If you find suitable employment elsewhere, I will help you in transferring the grant, should you be promised funding, to another institution. The fact that your application is submitted with the School's acquiescence, however, should not be construed as an engagement, on the School's part, to extend your employment beyond the point determined by University regulations."

(RX-20)

Dr. De Weer testified that he had drafted the letter and had asked the Complainant to countersign it for the following reason:

Because that was my -- and still is -- my interpretation of the university rules.. I was unable to sign off on this grant because there was no -- what I was doing when signing a grant -- or it's not the grant we sign, it's the cover letter but same thing -we are, in so many words, saying that research can be performed, the equipment is there and the person is salaried or has support. I could not do that according to the wording of these cover letters and be truthful.

"So, I was willing to help him get the grant but I could not commit the university to things I could not legally, according to the rules, do." (T 302-303

The Complainant testified, in substance, that he declined to countersign the letter because he had not been asked to sign such a letter in connection with any previous grant proposals and, to the best of his knowledge, countersigning such letters was not standard practice. Instead, he followed Dr. De Weer's suggestion and contacted Gordon D. Williams, Vice President for Medical Center and Executive Director for School of Medicine Administration, who is the official designated to sign grants for the Dean. Mr. Williams testified that given the current funding restraints in the NIH, he believed it would be unusual if the Complainant's pending grant were funded. Nevertheless, as they had not as yet received formal word from NIH, he felt the fairest. thing to do was to sign the grant. The grant was signed and processed expeditiously to meet the deadline. Mr. Williams informed the Complainant of this decision in a letter dated March 10, 1992.(RX-14) He informed him also at that time that if he did not receive funding from NIH and if he is unable to provide salary support from other grants, his faculty

appointment would terminate at the end of May or early June of that year and the Cerebral Palsy Foundation would have to be informed that he was no longer a faculty member of the University of Pennsylvania.

In a letter dated April 14, 1992, Dr. Schwartz advised the Complainant again that in the absence of his obtaining funding to cover the major part of his salary, his academic appointment would terminate on June 30, 1992. He added that he would be happy to support the Complainant's efforts to find a position at another institution.

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The Complainant testified to the effect that he did not work at his laboratory in the Piersol Building on a regular basis in 1992. He preferred to work elsewhere because of what he perceived as a hostile atmosphere at the Piersol Building site. His father passed away on July 14, 1992 and he left the Philadelphia area the following morning to attend his funeral in Kansas. Upon his return home late on July 22, 1992, he found the following letter, dated July 19, 1992, from Roberta Metelits, Business Administrator of the Department of Physiology:

> "Please allow me to express my condolences to your family on the death of your Father. I left a message on your answering machine this morning but I have no way of knowing when you plan to return to your home. Therefore, this letter is a follow up to the phone call in the hope your mail is being forwarded.
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> "The Piersol Building is being evacuated this week. We have been asked to notify everyone to remove all personal belongings from the building by Friday, July 24, 1992 at 5:00 P.M. If you cannot comply with this request by Thursday evening, we will assume that you are still away. On Friday, we will have to pack your personal belongings and store them."

Upon arriving at the laboratory in the Piersol Building on July 23, 1992, the Complainant discovered that the contents were missing from two refrigerators that he used to store chemicals, compounds and biological materials needed to support his research results. Also missing were biological materials which were stored in a freezer. He "ran into" Roy Schneiderman who acknowledged having removed the materials with the help of Peter Marro. The Complainant expressed his dismay and inquired as to why they had been removed. The answer was that Dr. Schneiderman had been told to remove the materials.

The record includes an inventory of these items which the Complainant believes was prepared sometime in 1990. (P (Complainant's Exhibit)-15 & 16) He was unable to state how much, if any, of the chemicals had been used subsequent to the preparation of the list. He stated that the shelf life of these chemicals varied.

Some of the chemicals and compounds belonged to Sang J. Kim, the Complainant's former research assistant. The Complainant has acknowledged that Mr. Kim was to

remove his personal belongings from the laboratory in September 1991 when his employment with the University was terminated. Mr. Kim's material was left in the refrigerators, however, because he had no other place to store them and because there was hope that they would have the opportunity to collaborate again.

Dr. Roy Schneiderman, an instructor in pediatrics at the School of Medicine and an attending neonatologist at the Hospital of the University of Pennsylvania, testified that he and a Dr. Marro were assigned by Dr. Delivoria to supervise the preparation for moving the laboratory in the Piersol Building. A separate company was engaged for the moving

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of chemicals and this was to take place on July 23, 1993. In preparation for this portion of the move, the chemicals which appeared to have further use were packed for moving and those which were of no further use were earmarked for disposal. He consulted with Dr. Delivoria as to how to proceed with the chemicals in the refrigerator utilized by the Complainant and was told to treat them as he did the other chemicals. The chemicals which were retained were pooled for the move. It was his understanding that the material in the refrigerator was purchased from grant funds and was not the personal property of the Complainant. He did not recall seeing any biological materials in the refrigerator.

Dr. Schneiderman testified further that there was a deep freezer in the laboratory which was used to keep biological samples at very low temperatures. The chemical company advised them to pack these materials in canisters with dry ice. This was done on July 27, the day of the move. It did not turn out to be "great advice" as the items did not maintain their low temperatures and were destroyed.

The Complainant has identified certain equipment which had been removed from the laboratory during the move. Dr. De Weer testified that anything which had been purchased from grant funds became the property of the University and not the principal investigator under the grant. If the principal investigator moved to another institution, such purchases could be transferred to the new institution with the permission of the University. The Complainant has acknowledged having been told of this policy by NIH.

The Complainant was able to retrieve books, reprints, records and files which he kept in his office in the Piersol Building. He was also given access to the computer he used there so that he could download the data that was stored in the computer.

By letter dated July 31, 1992, Dr. De Weer informed the Complainant that his July paycheck represents the remaining balance of his grant and that his appointment as Research Associate Professor expires July 31, 1992. By a separate letter of the same date, Dr. De Weer responded to inquires from the Complainant concerning the whereabouts of the contents of his refrigerator, and whether alternative space was being made available for his belongings and equipment. He informed the Complainant that no alternative space was being provided to him in view of the termination of his grant and appointment. He

informed him also that the University owns title to the equipment and supplies, and, as to their whereabouts, he assumed that they were packed in his absence by Dr. Delivoria's staff and stored awaiting further decision. Dr. De Weer has stated that he was aware of the prior complaint filed by the Complainant.

CONCLUSIONS OF LAW

I. Timeliness of Complaint

As of August 27, 1992, the date on which the instant claim was filed, the Act provided that complaints thereunder must be filed within thirty days after the alleged violation occurs.

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Citing English v. Whitfield, 858 F.2d 957, 961 (4th Cir. 1988) and Delaware State College v. Ricks, 449 U.S. 250, 258 (1990), the Respondent contends that the complaint was not timely in regard to the termination as the Complainant had received final and unequivocal notice by April 14, 1992, at the very latest, that his appointment would terminate. The Respondent counters that neither of the cited cases are analogous to the facts in his case as he was given five separate notices, "and almost each one had a different date upon which the grant would expire."

In regard to the removal of the laboratory supplies and equipment, The Respondent contends that the Complainant was aware of this situation on July 23, 1992 whereas his complaint was not mailed until 35 days later. The Complainant argues on the other hand that it was not until he received Dr. De Weer's letter of July 31, 1992 that he realized that there was any problem regarding these materials and his complaint was filed within thirty days following receipt of the letter.

Initially, I note that pursuant to 29 C.F.R. §18.1. in the absence of any contrary provisions in the ERA, its implementing regulations and the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (29 C.F.R. Part 18), the Federal Rules of Civil Procedure are applicable to the instant proceeding. Cf. Cooper v. Bechtel Power Corporation, 88-ERA-2 (Decision and Order of the Secretary, October 3, 1989). Fed. R. Civ. P. 8 (c) provides that statutes of limitations are affirmative defenses and most be asserted at the earliest possible moment. Davis v. Bregan, 810 F. 2d 1533, 1536 (2d Cir. 1987). Neither the ERA, the regulations nor any prehearing order required the Respondent to file an answer to the complaint prior to the hearing in this matter. The Respondent raised the issue of the timeliness of the complaint in its opening statement at the hearing. I consider this to be the Respondent's earliest opportunity to do so and conclude that it has asserted this defense in time.

I agree with the Respondent that the holdings in English v. Whitfield, supra and Delaware State College v. Ricks, supra are directly in point to the instant case. It is well

settled that the statute of limitations on a claim alleging an unlawful employment practice begins to run on the date the employee is given definite notice of the challenged employment decision rather than the time that the effects of the decision are ultimately felt. See also, Rainey v. Wayne State University, 89-ERA-8 (Decision and Order of the Secretary, May 9, 1991); Ray v. Tennessee Valley Authority, 88-ERA-14 (Decision and Order of the Secretary, January 25, 1991). It has been held also that the filing period commences on the date the complainant is first notified of the decision to terminate him or her and not on the date that he or she received written notice of the termination. McGarvey v. EG & G Idaho, Inc., (Decision and Order of the Secretary, September 10, 1990).

The Complainant's termination was the proximate result of the Respondent's having declined to fund his salary beyond the exhaustion of his grant salary support. The Respondent's position in this regard was communicated to him as early as

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November 1, 1991. Clearly, the Complainant should have known by March 10, 1992 that the Respondent had no intention of continuing his employment beyond the point that it was funded by outside grants and he had no reasonable expectation at that point of timely receiving a sufficient new grant. Accordingly, I conclude that the complaint as to his termination was not filed in time.

I conclude also that the complaint is not timely as it concerns the removal of the laboratory materials and equipment. The Complainant visited the laboratory on July 23, 1992 and discovered on that date that certain items he believed to be there were missing. He confronted Dr. Schneiderman that same day and learned or could have learned of the disposition of the materials. He did not need a letter from Dr. De Weer. Consequently, I find that the time for filing his complaint as to this alleged adverse action commenced on July 23, 1992.

II. Merits of Complaint

Even though I am prepared to recommend to the Secretary that the complaint be dismissed because of its having been filed out of time, I deem it advisable and expedient to consider it also on its merits.

The applicable burdens and order of presentation of proof in cases arising under Section 210 (a) of the ERA were set forth in Darfey v. Zack Company, 82-ERA-2 (Decision and Order of the Secretary, April 25, 1983) as follows:

> "[T]he employee must initially present a prima facie case consisting of a showing that he engaged in protected conduct, that the employer was aware of that conduct and that the employer took some adverse action against him. In addition, as part of his prima facie case, 'the plaintiff must present evidence sufficient to raise the

> inference that ... protected activity was the likely reason for the adverse action.' [Citation omitted]. If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. Significantly, the employer bears only a burden of producing evidence at this point; the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. [Citation omitted]. If the Employer successfully rebuts the employee prima facie case, the employee still has 'the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision... [The employee] may succeed in this either directly or by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' [Citation omitted]. The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee has proved actionable retaliation for protected activity. Conversely, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence.' [Citation omitted]. Finally, the trier of fact may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had 'dual motives.'

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> "[I]f the trier of fact reaches the latter conclusion, that the employee has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer, in order to avoid liability, has the burden of proof or persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of protected conduct. [Citation omitted]."Slip op at 7-9

The Complainant's filing of his prior complaint under the BRA clearly is protected conduct and the record establishes that at least Dr. De Weer was aware of the same. Consequently, I do not deem it necessary to decide whether his purported support of Mr. Kim's case under the ERA has been adequately established in the record or otherwise constitutes protected activity. Furthermore, the record establishes that the Respondent took an adverse action against him by terminating his appointment when his grant became exhausted. However, what the Complainant has not established is that his protected activity was the likely reason for his termination.

I am convinced by the record in this case that the Respondent's had a firm policy of requiring its research faculty to obtain outside funding for at least a substantial part of their salaries. They have shown instances of this policy having been applied to other researchers while the Complainant has not established that the policy has not been administered even- handedly. Although the Respondent did offer some supplemental assistance for services rendered by the research faculty, including the Complainant, in

training research fellows, no incident has been brought to my attention where such assistance came anywhere close to approaching one hundred percent of salary. The only disparate treatment that the Complainant points to in this regard is that he was requested to acknowledge receipt of certain communications while others were not. I consider this to be of no consequence. I see nothing sinister in Dr. De Weer's or Dr. Schwartz's wanting to document the Complainant's receipt of their notifications to him and see no reason why he should have taken offense at the request.

Even assuming that the Complainant had made out a prima facie case, for reasons already stated I conclude that the Respondent was motivated by legitimate, nondiscriminatory reasons for terminating the Complainant's appointment. Indeed, I believe they have shown this by clear and convincing evidence.

I conclude also that the Complainant has not made out a prima facie case regarding the laboratory materials and equipment. First of all, it appears that he had virtually boycotted the laboratory for at least several months before the building was evacuated. The inventories he submitted into evidence were based on materials which were present in the laboratory many months before the move. According to Dr. Schneiderman's testimony the usable items in the refrigerators utilized by the Complainant were sent to storage and he

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apparently has made no effort to ascertain what these items are. Consequently, I have difficulty classifying the removal of the laboratory material as an adverse action without more definitive evidence as to what items, if any, are missing as a result of the move. Secondly, it is not established that Dr. Schneiderman, the person responsible for the removal and/or destruction of any of the Complainant's material, was aware of the Complainant's having engaged in protected activity. Such scienter on the part of the person responsible for the adverse action is an essential element. of a prima facie case. Cf. Delchamps, Inc. v. NLRB, 585 F.2d 91,94 (5th Cir. 1978) I recognize that Dr. Schneiderman did take some general direction from Dr. Delivoria but evidence regarding her knowledge of protected activity has not been entered into the record.

In any event, I conclude that the Respondent has clearly and convincingly established a legitimate, nondiscriminatory reason for the removal of the laboratory material and equipment. The building needed to be vacated and time was of the essence. The Complainant had given no indication as to when he would be available to personally attend to the removal or storage of the supplies and equipment he had utilized in his research and the job needed to be done. There is no showing that anyone other than the Complainant and Mr. Kim was aware that any material belonging to either of them was contained in the refrigerators or other parts of the laboratory. In fact, the Respondent was led to believe that all of Mr. Kim's belongings had long since been removed from the laboratory. The Complainant's departure from the University was imminent and at least temporary custody and control of the materials in the laboratory was to revert to the

Respondent. The Respondent did reasonably accommodate him in regard to retrieving his personal computer and other records. It is unfortunate that this all occurred during a time that the Complainant was experiencing a personal tragedy. But, I do not see where the Respondent could or should have acted any differently under the circumstances.

RECOMMENDED ORDER

It is recommended to the Secretary of Labor that the complaint of Dr. L. Craig Wagerle be dismissed either on the basis that it was not timely filed or on the basis that he has not established that the Respondent has taken any adverse action against him because of his having engaged in protected activity under the ERA.

JOEL R. WILLIAMS
Administrative Law Judge